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Notes

ENFORCEABILITY OF EXECUTIVE-CONGRESSIONAL AGREEMENTS IN LIEU OF AN ARTICLE II TREATY FOR PURPOSES OF EXTRADITION: *ELIZAPHAN NTAKIRUTIMANA v. JANET RENO*

I. INTRODUCTION

Although the Constitution does not expressly refer to executive branch authority to conclude international agreements other than treaties, executive agreements have become an accepted part of United States law and practice.¹ More than ninety percent of the United States' international agreements are one of three types of executive agreements.² The

1. See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (recognizing that not all international agreements are treaties requiring Senate participation). *Belmont* dealt with an executive agreement entered into by the President of the United States with the government of the Soviet Union. See *id.* Under this agreement, the United States recognized the government of the Soviet Union, established diplomatic relations between the two countries and exchanged ambassadors. See *id.* (detailing aspects of agreement). Because the agreement was entered into without the participation of the Senate, the validity of the agreement was challenged. See *id.* (explaining challenge to agreement). The Supreme Court recognized the authority of the executive to speak as the sole organ of the United States government over foreign affairs. See *id.* (recognizing authority of executive). Furthermore, the Court stated that "an international compact, as this was, is not always a treaty which requires the participation of the Senate." *Id.*; see *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (recognizing President's power to enter into executive agreements without obtaining advice and consent of Senate); *United States v. Pink*, 315 U.S. 203, 229 (1942) (positing that "[t]he powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States"); *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1911) (recognizing that certain international compacts do not require advice and consent of Senate).

An executive agreement has been defined as "an international agreement or as a memorandum of understanding, memorandum of agreement, memorandum of arrangement, exchange of notes, exchange of letters, technical arrangement, protocol, note verbal, aide memoir, statement of understanding or any other name," so long as the parties intend a legal obligation under international law. *United States Dep't of State Circular 175*, 22 C.F.R. pt. 181, encl. 2, para. 1a(3) (1985).

2. See CONGRESSIONAL RESEARCH SERVICE, 95TH CONG., 1ST SESS., INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES 22-23 (Comm. Print 1977) (summarizing international agreements entered into by United States from 1976 and 1972) [hereinafter CONGRESSIONAL RESEARCH]. The three types of international agreements other than treaties are the treaty authorized executive agreement, the sole executive agreement and the executive-congressional agreement. See Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1092-93 (1990) (noting that there are three categories of executive agreements). Between 1946 and 1972, only 6.2% of all international agreements concluded by the United States were concluded as treaties. See CONGRESSIONAL RESEARCH, *supra*,

most common of the three types is the executive-congressional agreement.³

Executive-congressional agreements are unique in that they require the assent of a majority of both houses of Congress, as opposed to the two-thirds supermajority of the Senate that is required to implement a treaty.⁴ Executive-congressional agreements also differ in that, more often than not, Congress approves them after their creation via the President's executive agreement.⁵

In 1995, on the basis of the President's authority to enter into executive agreements, the President of the United States entered into an executive agreement with the International Criminal Tribunal for Rwanda ("ICTR").⁶ Under the terms of the agreement, the United States agreed

at 22. Of the remaining international agreements, 88.3% were concluded as executive-congressional agreements and 5.5% were concluded as executive agreements. *See id.*

3. *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 205, 98 Cong., 2d Sess. 38 (1984) (noting that executive-congressional agreements are most frequently concluded type of international agreements).

4. *See* Randall, *supra* note 2, at 1094 (describing requirements of executive-congressional agreements).

5. *See id.* (describing appeal process).

6. *See Agreement on the Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States*, Jan. 24, 1995, U.S.-Int'l Trib. Rwanda [hereinafter *Agreement*]. The executive agreement serves as a surrender agreement between the United States and the ICTR. *See id.* It sets forth the conditions and obligations that must be met before surrender will be granted to the ICTR. *See id.*; *see also* Kenneth J. Harris & Robert Kushen, *Prosecuting International Crime: Surrender of Fugitives to the War Crimes Tribunal for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 581 (1996) (discussing executive agreements signed with Yugoslavia Tribunal and Rwanda Tribunal on October 5, 1994 and January 24, 1995, respectively).

The Security Council of the United Nations established the Tribunal via Resolution 955. *See* S.C. Res. 955, U.N. SCOR, 49th Year, 3453rd meeting, U.N. Doc. S/INF/50 (1994). The essence of the obligation on nations to surrender fugitives to the Tribunal is expressed in operative paragraph 2 of the resolution:

[The Security Council] [*d*]ecides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with request for assistance or orders issued by a Tribunal chamber under Article 28 of the Statute.

Id. The Security Council derives the authority to create the tribunal from Chapter VII of the Charter of the United Nations. *See* U.N. CHARTER art. 12 (describing source of authority). Under this chapter, the Security Council is given broad authority with respect to threats to the peace and acts of aggression. *See id.* art. 39 (describing Security Council's authority). Furthermore, the Security Council is given specific authority to decide what measures need to be taken to maintain or

to surrender, upon the ICTR's request, fugitives charged with the commission of crimes during the 1994 Rwandan civil war.⁷ In 1996, the ICTR requested from the United States the surrender of Elizaphan Ntakirutimana, a Rwandan pastor accused of committing various crimes of genocide.⁸ This marked the first time the tribunal requested the surrender of a fugitive from the United States.⁹

This Note examines the United States Court of Appeals for the Fifth Circuit's analysis of the constitutionality of the executive-congressional agreement with the ICTR. Part II reviews the history of the Supreme Court's decisions concerning the validity of executive-congressional agreements and the function of the court on habeas corpus review.¹⁰ Part III sets forth the relevant facts, as well as the legal arguments posited by Ntakirutimana.¹¹ Part IV discusses the court's reasoning and legal analysis in *Ntakirutimana v. Reno*.¹² Part V addresses the impact that the Fifth Circuit's decision may have on the future extraditability of fugitives based on executive-congressional agreements.¹³

restore international peace and security. See *id.* art. 41 (noting authority of Security Council). Under Article 48 of the Charter, "[t]he action required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations" *Id.* art. 48, para. 1.

7. See *Agreement*, *supra* note 6, art. 1, cl. 1.

8. See *Ntakirutimana v. Reno*, 184 F.3d 419, 423 (5th Cir. 1999) (discussing facts of case). The specific obligation to surrender fugitives is found in Article 28 of the Rwandan Tribunal Statute, which reads as follows:

1. States shall cooperate with the International Tribunal [for Rwanda] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - ...
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal [for Rwanda].

Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, S.C. Res. 955, U.N. SCOR, 49th Year, 1994 S.C. Res. & Dec. at 15, U.N. Doc. S/INF/50 (1994) [hereinafter *Statute*].

9. See *Harris & Kushen*, *supra* note 6, at 561-62 (noting that Ntakirutimana was first person requested for surrender by ICTR).

10. For further discussion of the Supreme Court's decisions concerning the validity of executive-congressional agreements, see *infra* notes 14-66 and accompanying text.

11. For further discussion of the facts and legal arguments posited by Ntakirutimana, see *infra* notes 67-92 and accompanying text.

12. 184 F.3d 419 (5th Cir. 1999). For further discussion of the court's reasoning and legal analysis, see *infra* notes 93-198 and accompanying text.

13. For further discussion of the impact of the Fifth Circuit's decision on the future extraditability of fugitives based on executive-congressional agreements, see *infra* notes 199-212 and accompanying text.

II. BACKGROUND

A. *The Treaty Power and The Validity of Executive-Congressional Agreements*1. *The United States Constitution*

Article II, section 2 of the United States Constitution grants the President the “[p]ower, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”¹⁴ A treaty is merely one method, albeit the least controversial, through which the federal government may conclude international agreements.¹⁵ Another method is through a majority vote of each house of Congress.¹⁶ Congress derives this power from Article I, section 1, which grants legislative power to both houses of Congress: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁷ Much debate exists as to the validity of this type of international agreement.¹⁸

Aside from laying out the most basic aspects of entering into, implementing and enforcing a treaty, the Constitution is somewhat lacking in respect to treaties.¹⁹ The references to treaties contained in the Constitution mainly serve the function of ensuring that the treaty power is reserved to the federal government and not to the states.²⁰ The lack of constitutional guidance concerning treaties has led to debate over whether there

14. U.S. CONST. art. II, § 2.

15. See Randall, *supra* note 2, at 1093-97 (discussing various types of international agreements other than treaties).

16. See *id.* at 1094 (noting executive-congressional agreements require majority vote of each house of Congress).

17. U.S. CONST. art. I, § 1, cl. 8.

18. See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 804 (1995) (analyzing constitutionality of executive-congressional agreements and specifically focusing on constitutionality of NAFTA); Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225-28 (1995) (criticizing validity of executive-congressional agreements).

19. See U.S. CONST., art. II (establishing requirements for creation of treaty). Article II of the Constitution states that the President may enter into treaties with the advice and consent of two-thirds of the Senate. See *id.* art. II, § 2 (enumerating executive power). Article IV extends the judicial power to all cases arising under treaties. See *id.* art. IV, § 2, cl. 1 (enumerating judicial power). Article VI states that treaties shall be the supreme law of the land. See *id.* art. VI, cl. 2 (discussing status of treaties as law in United States).

20. See Randall, *supra* note 2, at 1089 (“These references to treaties are sparse probably because the framers’ primary objective was to ensure that the federal government, not the states, possessed authority over international agreements.”). Article I of the Constitution states that “[n]o State shall enter into any treaty . . .” U.S. CONST. art. I, § 10, cl. 1. Article I sets forth the powers granted to the legislative branch. See *id.* art. I. The article specifically denies states the power to enter into treaties, or other types of international agreements. See *id.* The article thereby ensures that the individual states do not have the power to conclude international agreements. See *id.*

are types of agreements that can only be concluded as treaties to which the Senate has given its advice and consent.²¹

a. Interpretivists

Two divergent views exist regarding the validity of executive-congressional agreements.²² Interpretivists advance the position that all international agreements must be made in accordance with the treaty clause contained in Article II, section 2.²³ Hence, proponents of this theory believe that all executive-congressional agreements are unconstitutional because they are concluded without the advice and consent of two-thirds of the Senate.²⁴ Interpretivists believe that only what is contained in the ex-

21. See Detlev F. Vagts, Comment, *The Exclusive Treaty Power Revisited*, 89 AM. J. INT'L L. 40, 40 (1995) (discussing debate over whether Uruguay Round amendments to General Agreement on Tariffs and Trade should not be ratified except through two-thirds vote of Senate). The debate over whether there are certain types of agreements that should only be concluded as Article II treaties began in the period after the world wars. See Arthur W. Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 406-09 (1977) (noting that debate over validity of international agreements other than treaties grew in period after World War II). It was during this period that more executive agreements than treaties were being concluded. See *id.* at 406 (setting forth reasons why more executive agreements were concluded after 1946). One reason is the increase in the number of nations in the world after World War II. See *id.* (noting that in 1977 there were nearly 150 nations in existence). Another reason is that it was during this period the United States "became a highly active participant in world politics." *Id.* at 407. Finally, the nature of the United States' relations with foreign sovereigns is less formal, calling for less formal agreements. See *id.* (positing that in period after World War II United States' position in world politics required more, and less formal, relations with foreign nations).

Because executive agreements do not require the advice and consent of the Senate, they are "uniquely suited for situations where prompt agreement is required." Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L.J. 45, 59 (1995). Furthermore, one commentator noted:

The president's powers are not susceptible of definition in advance. Changes in power relations, the shifting nature of alliances and adversarial postures, and most certainly, the rapid development of military technologies mean that he must often act in ways that no one can foresee even a day in advance, much less in the ages to come.

22. Robert H. Bork, *Foreword to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* ix-xii (L. Gordon Crovitz & Jeremy B. Rabkin eds., 1989).

See Randall, *supra* note 2, at 1093-96 (discussing debate between interpretivists and noninterpretivists).

23. See *id.* at 1094 (discussing position held by interpretivists).

24. See *id.* (explaining interpretivist position); see also Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 4-7 (1972) (setting forth notion that President only has power expressly conferred by text of treaty clause); Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 630 (1945) (stating that "[t]he Constitution is based on the theory that this is a government of limited powers"); Peter L. Fitzgerald, *Executive Agreements and the Intent Behind the Treaty Power*, 2 HASTINGS CONST. L.Q. 757, 766 (1975) ("[T]he president's independent powers were, in the view of the founders, limited in such a way

plicit language of the Constitution is valid.²⁵ Because the only mention of treaties is contained in the treaty clause, and the treaty clause mentions no alternative type of international agreement, neither Congress nor the President are granted constitutional authority to conclude agreements other than treaties.²⁶

Interpretivists feel that in addition to unconstitutionally extending the President's power, executive-congressional agreements confer an insupportable grant of power to the House of Representatives.²⁷ Pointing to constitutional history, interpretivists argue that the intent of the Framers is evident in the specific language of the Constitution.²⁸ In other words, if the Framers intended for the consent of the House of Representatives to be required to conclude a treaty, the treaty clause would require the President to obtain the consent of both houses of Congress instead of simply the consent of the Senate.²⁹

b. Noninterpretivists

On the other side of the argument are the noninterpretivists.³⁰ Proponents of this view do not advance such a literal reading of the Constitution.³¹ They propose that language contained in Article I, section 10 prohibiting states from entering into "any Agreement or Compact with another State, or with a Foreign Power" is evidence that the Framers contemplated the existence of international agreements other than treaties.³²

that the treaty process of Article II would remain the exclusive procedure for entering into international agreements.").

25. See Berger, *supra* note 24, at 5 (noting that because term "negotiate" is not found in treaty clause President's power is limited to obtaining advice and consent of Senate in order to "make" treaty); see also Fitzgerald, *supra* note 24, at 765 ("The statements of the founders show that the treaty power was intended to be 'carefully guarded' and the exclusive means of making international agreements.").

26. See Randall, *supra* note 2, at 1094 (noting that extreme interpretivists hold that treaties are only valid type of international agreements).

27. See *id.* at 1094-95 (positing that allowing executive-congressional agreements unfoundedly enhances House of Representatives' power); see also Borchard, *supra* note 24, at 625 (stating that to involve both houses of Congress in treaty-making power contained in Constitution would be extreme change to Constitution).

28. See *id.* n.28 (citing to FEDERALIST NO. 75 at 452 for proposition that treaty-making power is better reserved to Senate in view of their longer terms).

29. See Borchard, *supra* note 24, at 663 (stating that if both houses of Congress were meant to be included in treaty clause, language of Constitution would say "Congress" instead of "Senate").

30. See Randall, *supra* note 2, at 1095 (discussing position held by noninterpretivists).

31. See *id.* (stating that noninterpretivists do not focus on specific language of Constitution).

32. Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 1), 54 YALE L.J. 181, 221 (1945) (noting that Article I, § 10 is significant because it shows Framers recognized existence of other types of international agreements).

The heart of the noninterpretivists' argument lies in the state of modern foreign affairs.³³ Noninterpretivists hold the view that due to the necessity and frequency with which international agreements are concluded in modern times, concluding and ratifying international agreements through the treaty clause is too time-consuming.³⁴ Furthermore, noninterpretivists believe that the true intent of the Framers was to set up a majoritarian process.³⁵ Thus, a majority vote of each house of Congress authorizing an executive agreement is in line with the intent of the Framers.³⁶

2. *Supreme Court Decisions*

The Supreme Court has consistently recognized the validity of executive agreements and executive-congressional agreements.³⁷ In *Altman & Co. v. United States*,³⁸ the Supreme Court recognized that certain international compacts do not require the advice and consent of the Senate, and thus upheld the executive agreement in question.³⁹ The Court failed, however, to identify what type of international compacts did not require a treaty.⁴⁰ This question was partially answered by the Court in *Valentine v. United States*.⁴¹

33. *See id.* at 261-306 (stating that modern international relations require flexibility afforded by executive-congressional agreements).

34. *See id.* (explaining noninterpretivists' approach of favoring efficiency over exact language).

35. *See id.* at 216-26 (proposing that United States was founded on principles of majority rule and participation of both Houses of Congress in implementing international agreements is truer representation of people).

36. *See id.* (positing that executive-congressional agreements are consistent with Framers' intent).

37. *See, e.g.,* *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981) (upholding validity of executive agreements); *Banco Nacional de Cuba v. L. F. Sabbatino*, 376 U.S. 398, 462 (1964) (White, J., dissenting) (recognizing validity of executive agreements); *Reid v. Covert*, 354 U.S. 1, 15 (1957) (upholding executive agreement in process of handing down judgement in case); *United States v. Pink*, 315 U.S. 203, 223 (1942) (holding that all international agreements are to be treated equally); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (holding that executive agreements are on same footing as treaties concluded under treaty clause); *Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (upholding validity of "compact authorized by the Congress of the United States [and] negotiated and proclaimed under the authority of its President").

38. 224 U.S. 583 (1912).

39. *See id.* at 601 (stating that commercial agreement made under Tariff Act of 1897 was not treaty requiring ratification).

40. *See id.* (failing to specify what international compacts are not treaties requiring ratification). The issue before the Supreme Court in *Altman* was whether an agreement is a treaty unless made by the President and ratified by the Senate, as required by the treaty clause in Article II. *See id.* at 583. The Court merely held that even though the commercial agreement in question was a treaty, it was a valid international compact. *See id.* at 601. The Court failed to specify what type of international agreements do not have to be concluded as treaties. *See id.*

41. 299 U.S. 5 (1936). The issue before the Court in *Valentine* was whether an extradition treaty between France and the United States conferred power on the

The controlling Supreme Court decision pertaining to extradition is *Valentine*.⁴² In that case, the Court upheld the extradition of fugitives based on executive-congressional agreements.⁴³ The question before the Supreme Court in *Valentine* was whether fugitives who were citizens of the United States could be extradited to France for crimes committed there, pursuant to an extradition treaty that excepted citizens of the United States.⁴⁴ The Court held that because the President's power to extradite was conferred by a treaty, the treaty must confer the power to extradite United States citizens in order for them to be extradited.⁴⁵ Because the treaty failed to grant the necessary authority, the fugitives were not extraditable.⁴⁶

In reaching its conclusion, the Court first recognized the clearly established principle that the power to extradite is one belonging to the federal government and not to the states.⁴⁷ Albeit a national power, it is not unlimited.⁴⁸ The Court qualified the power to extradite by noting that the executive can only exercise this power pursuant to a treaty or

executive to surrender one of its own citizens. *See id.* at 10. France had requested the extradition of two United States citizens found guilty of committing crimes in France. *See id.* at 6. The Court examined the language of the extradition treaty to determine whether the treaty conferred power on the executive to surrender one of its own citizens. *See id.* at 10. The Court found that the treaty contained explicit language stating that neither country shall be bound to surrender its own citizens. *See id.* The Court posited that although, as a general rule, it is desirable to liberally construe the obligations of treaties to give effect to the apparent intention of the parties, this is no substitute for authority conferred by the law. *See id.*; *see, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933) (holding that when two interpretations of treaty are possible, narrow one should be avoided); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (noting that when treaty has two meanings, broader one should be applied); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (holding that treaties should be interpreted broadly to give effect to their intent). The *Valentine* Court held that denying an obligation is not equivalent to a grant of power. *See Valentine*, 299 U.S. at 10-11 (stating that history and practice do not support grant of implied discretionary power).

42. *See Valentine*, 299 U.S. at 8-10 (setting forth rules pertaining to extradition).

43. *See id.* at 8-9 (holding that extradition is valid if power to surrender is conferred on executive by legislative provision).

44. *See id.* at 6 (stating issue before Court).

45. *See id.* at 18 (setting forth holding of Court).

46. *See id.* (holding that President could not surrender respondents because treaty with France fails to grant necessary authority).

47. *See id.* at 8 (citing *United States v. Rauscher*, 119 U.S. 407, 412-14 (1886) for proposition that extradition is national power). This prohibition on the states is contained in Article 1, § 10 of the Constitution. *See* U.S. CONST. ART. 1, § 10 ("No State shall enter into any Treaty . . . Agreement or Compact with another State . . ."); *see also* Randall, *supra* note 2, at 1089 (proposing that primary objective of references in Constitution to treaties is to ensure that states do not enter into them).

48. *See Valentine*, 299 U.S. at 8 (noting limits on executive's power to extradite).

legislative provision.⁴⁹ Thus, as long as the power to surrender is authorized by law, there is no requirement that the power to extradite must be conferred by treaty.⁵⁰ The conventional or legislative provision from which the power to extradite is derived must specifically grant the power to surrender to the executive.⁵¹ It is insufficient for the conventional or legislative provision to simply not deny the power to surrender.⁵²

The Court, therefore, established the principle that the power to extradite a fugitive does not need to be conferred by treaty.⁵³ The Court recognized the validity of a legislative provision conferring a grant of power upon the executive to extradite a fugitive.⁵⁴

B. *Habeas Corpus Review*

In *Collins v. Loisel*,⁵⁵ the Supreme Court held that the function of the committing court in extradition proceedings is “to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction.”⁵⁶ The decision of the committing court is not appealable by the government or by the defendant.⁵⁷ The government, however, is free to reinstitute an extradition request if the first request is denied.⁵⁸ The only means by which the defendant may seek review of the committing court’s decision is by filing a habeas corpus petition.⁵⁹

49. See *id.* at 8-9 (citing 1 JOHN BASSETT MOORE, MOORE ON EXTRADITION 21 (1974)).

50. See *id.* (analyzing extradition power).

51. See *id.* at 9 (requiring that executive be given specific power to extradite).

52. See *id.*

53. See *id.* at 8-10 (holding that power to extradite can either be conferred by treaty or legislative provision).

54. See *id.* (recognizing legislative provision granting power to extradite).

55. 259 U.S. 309 (1922).

56. *Id.* at 316; see *Grin v. Shine*, 187 U.S. 181, 197 (1902) (holding that guilt is for requesting jurisdiction to determine); *Benson v. McMahon*, 127 U.S. 457, 462-63 (1888) (holding that main function of habeas corpus petition is for court to consider if evidence justifies surrendering fugitive and not if evidence establishes guilt).

57. See *Collins v. Miller*, 252 U.S. 364, 369 (1920) (“But the proceeding before a committing magistrate in international extradition is not subject to correction by appeal.”).

Extradition requests are not appealable under 28 U.S.C. § 1291. See 28 U.S.C. § 1291 (1994). Section 1291 states that “[t]he jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.” *Id.*; see 28 U.S.C. §§ 1292 (c) and (d), 1295.

58. See *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993) (noting that government may institute second extradition request if first one is denied); see also *United States v. Doherty*, 786 F.2d 491, 502 (2d Cir. 1986) (same); *Gusikoff v. United States*, 620 F.2d 459, 461 (5th Cir. 1980) (same); *Hooker v. Klein*, 573 F.2d 1360, 1365 (9th Cir. 1978) (same).

59. See *United States v. Lui Kin-Hong*, 110 F.3d 103, 107-08 (1997) (stating that only option for defendant is to file habeas corpus petition); see also John G.

The function of the habeas corpus petition "is to determine whether there is any competent evidence tending to show probable cause."⁶⁰ Extradition proceedings are designed to determine whether the evidence is sufficient for the accused to stand trial and not to determine whether the evidence is sufficient to convict.⁶¹ In *Loisel*, the Supreme Court held that if the committing court assumed the responsibility of examining the weight and sufficiency of the evidence, as well as the credibility of the witnesses' testimony, "the foreign government . . . would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here."⁶²

In its probable cause finding, the committing court does not engage in fact finding.⁶³ Thus, the reviewing court will uphold the committing court's probable cause finding if it is supported by any competent evidence in the record.⁶⁴ The Supreme Court has stated that proof sufficient to substantiate that the person charged with having committed the crime actually committed it established probable cause.⁶⁵ Thus, if "the judgment of the [committing judge is] rendered in good faith on legal evidence that the accused is guilty of the act charged . . . [then the

Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1472 (1988) ("The accused then may bring an action for habeas corpus to test the legality of his detention."). There is some authority, however, that a defendant may challenge a finding of extraditability via a declaratory judgment action. See, e.g., *Sayne v. Shipley*, 418 F.2d 679, n.17 (5th Cir. 1969); *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

60. *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980); see also *Loisel*, 259 U.S. at 314-15 (stating that function of Court is to determine if sufficient legal evidence exists to justify surrender); *Charlton v. Kelly*, 229 U.S. 447, 460 (1913) (noting that Court's function is to determine if evidence is sufficient to justify surrender); *McNamara v. Henkel*, 226 U.S. 520, 523 (1913) ("The question simply is whether there was any competent evidence before the Commissioner entitling him to act under the statute."); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971) (stating that function of habeas corpus petition is to determine if competent evidence exists to support finding of probable cause); *Sayne*, 418 F.2d at 684-86 (holding that habeas corpus petition is always available to fugitive despite absence of such requirement in governing statute); Jacques Semmelman, *Federal Courts, The Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1203 (1991) ("Habeas corpus review tests the legality, as opposed to the wisdom, of extradition.").

61. See *Loisel*, 259 U.S. at 316 (stating that it is not necessary for evidence to be sufficient to convict).

62. *Id.* (quoting *Charlton*, 229 U.S. at 461).

63. See *United States v. Manzi*, 888 F.2d 204, 205 (1989) (stating that habeas corpus review is not rehearing).

64. See *McNamara*, 226 U.S. at 523 (holding that committing court's finding will be upheld if finding of facts is based on sufficient evidence).

65. See *Ornelas v. Ruiz*, 161 U.S. 502, 512 (1896) (noting what constitutes probable cause).

judgment] cannot be reviewed on the weight of the evidence, and is final . . . unless palpably erroneous in law.”⁶⁶

III. ELIZAPHAN NTAKIRUTIMANA V. JANET RENO

In 1994, Rwanda was the scene of a bloody civil war between two ethnic Rwandan tribes, the Hutus and the Tutsis.⁶⁷ At the time, Rwanda was under the leadership of President Juvenal Habyarimana, a Hutu, thereby placing the Hutus in the majority.⁶⁸ Although there had been conflict between the tribes for many years, there was a resurgence of attacks against the Tutsis by the Hutus in April 1994.⁶⁹ The impetus for the violence was the death of President Habyarimana, which resulted when his plane crashed due to an artillery attack.⁷⁰ The civil strife ended with a Tutsi dominated government emerging victorious, and nearly one million people, mostly Tutsis, dead.⁷¹

An investigation by the United Nations into the crimes committed by the Hutu tribe, at the request of the Tutsi dominated government, revealed that the violations committed against the Tutsis by the Hutus were motivated by ethnic hatred.⁷² The findings of this investigation resulted in the establishment of the ICTR.⁷³ President Clinton entered into an executive agreement with the ICTR on January 24, 1995, in which the United States agreed to surrender indicted individuals found on its terri-

66. *Id.* at 509.

67. *See* Ntakirutimana v. Reno, 184 F.3d 419, 421 (5th Cir. 1999) (discussing history of Rwandan civil conflict).

68. *See id.* (noting that Rwanda was under leadership of President Habyarimana).

69. *See id.* (noting resurgence of attacks in 1994).

70. *See id.* (describing death of President Habyarimana).

71. *See id.* (stating that Tutsis emerged victorious from civil war against Hutus).

72. *See id.*; *see e.g.*, Douglass W. Cassel, Jr., *A Court of Our Own Making*, CHI. DAILY L. BULL., Feb. 10, 1998, at 5 (stating that Hutu slaughter of more than half million Tutsi was genocide); Nathan Koppel & Jane Elliott, *U.S. Pushes to Expel Rwandan for War Crimes; Tribunal Wants Pastor Tried for Alleged Genocide*, TEX. LAW., Apr. 12, 1999, at 1 (noting genocide of ethnic Tutsis during Rwandan civil war in 1994).

73. *See* Ntakirutimana, 184 F.3d at 422 (discussing creation of ICTR). The international tribunal was established by Security Council Resolution 955. *See Statute, supra* note 8 (establishing international tribunal). The ICTR, headquartered in Arusha, Tanzania, was created on November 8, 1994. *See id.* The tribunal is limited to the prosecution and punishment of those people responsible for crimes of genocide between January 1, 1994 and December 31, 1994. *See id.* The statute of the ICTR is contained in an annex to the resolution. *See id.* The ICTR is the first international criminal tribunal to prosecute for the crime of genocide. *See Report of the Secretary-General on the Work of the Organization—1998* (visited Oct. 22, 1999) <<http://www.un.org/Docs/SG/Report98/introd.htm>>.

tory.⁷⁴ Congress enacted legislation to implement the executive agreement in 1996.⁷⁵

Elizaphan Ntakirutimana is a Rwandan citizen and a member of the Hutu tribe.⁷⁶ In April 1994, Ntakirutimana served as President of the Rwandan Seventh Day Adventist Church, based in a church complex in Mugonero, Gishyita Commune, Kibuye Prefecture, Rwanda.⁷⁷ Since that time, he had been living with his son in Laredo, Texas.⁷⁸ In 1996, the ICTR returned two indictments against Ntakirutimana.⁷⁹ The first indictment, on June 20, 1996, charged Ntakirutimana with crimes of genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II to the Geneva Conventions.⁸⁰ The ICTR alleged that Ntakirutimana was responsible for the preparation and execution of a plan to encourage Tutsis to seek refuge in the Mugonero church complex.⁸¹ Once there, the Tutsis were slaughtered by machete

74. See generally *Agreement*, *supra* note 6 (stating under what circumstances United States agreed to surrender indicted individuals). For a discussion of the executive agreement between the United States and the criminal tribunal, see *supra* notes 6-9 and accompanying text.

75. See National Defense Authorization Act of 1996, Pub. L. No. 104-06, § 1342, 110 Stat. 486 (1996). In enacting this legislation, the United States became the twelfth nation to modify its domestic laws to ensure compliance with the Security Council's resolution. See Robert Kushen & Kenneth J. Harris, *Current Development: Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT'L L. 510, 510 (1996). Chapter 209 of Title 18 of the United States Code was amended to implement the Agreement. See *id.* at 515. Contained in Chapter 209 are provisions addressing critical aspects of extradition practice not normally governed by bilateral extradition treaties, notably §§ 3184, 3186, 3188, 3190-91 and 3195-96. See *id.* The chapter was amended to apply to the surrender of offenders to international tribunals. See *id.* This amendment was needed because tribunals are not sovereign states. See *id.* The affect of the amendment was to provide authority to the Secretary of State to surrender fugitives in accordance with resolutions of the Security Council. See *id.* at 516.

Relevant sections of the implementing legislation are §§ 3186 and 3196. See 18 U.S.C. §§ 3186, 3196 (1996). Section 3186 confers final authority upon the Secretary of State to surrender fugitives as to whom U.S. courts have ruled that the requirements for extradition have been met, while § 3196 permits the surrender of United States citizens even where the applicable treaty does not oblige the United States to do so. See 18 U.S.C. §§ 3186, 3196.

76. See *Ntakirutimana*, 184 F.3d at 422 (noting that Ntakirutimana is Rwandan citizen and member of Hutu tribe).

77. See *id.* A commune is equivalent to a county in the United States and a prefecture is equivalent to a state in the United States. See *id.* at n.4.

78. See *id.* at 423 (noting that Ntakirutimana had been living in Texas with his son since 1994).

79. See *id.* at 422 (detailing indictments against Ntakirutimana).

80. See *id.* (describing first indictment).

81. See *id.* (specifying allegations against Ntakirutimana).

and small arms fire.⁸² On June 21, 1996, the indictment was confirmed by a Tribunal judge, and an arrest warrant was issued for Ntakirutimana.⁸³

On September 7, 1998, a second indictment was confirmed, and another arrest warrant issued, charging Ntakirutimana with additional violations of the same crimes.⁸⁴ The events to which these crimes pertain took place in the area to where the survivors of the first massacre had fled—the Bisesero region.⁸⁵

In September 1996, pursuant to the ICTR request for Ntakirutimana's extradition, the federal government filed its first request in the United States District Court for the Southern District of Texas for Ntakirutimana's surrender to the ICTR.⁸⁶ The Magistrate Judge denied the request for surrender based on independent, alternative reasons: first, the judge found that the federal statute authorizing Ntakirutimana's surrender to the Tribunal was an unconstitutional assignment of authority to the extradition judge because extradition requires an Article II treaty; and second, that the federal Government's request and supporting documentation did not establish probable cause.⁸⁷

On January 29, 1998, the Government refiled its request for surrender seeking review by a different judge in the Laredo division for the Southern District of Texas.⁸⁸ The district court certified the surrender to the ICTR, holding that the National Defense Authorization Act of 1996 was constitutional and provided a basis for the extradition of Ntakirutimana.⁸⁹ Ntakirutimana filed a habeas corpus petition under 28 U.S.C. § 2241 challenging the district court's grant of the Government's second

82. See *id.* (listing reasons for denying request for surrender); see, e.g., Barbara Crossette, *Rwandan in Genocide Case Makes Last Appeal to Stay in U.S.*, N.Y. TIMES, Aug. 15, 1999, at A10 (discussing massacre of Tutsis by Hutus); Michael Kirkland, *U.S. to Court: Ease Rwandan Extradition*, UNITED PRESS INT'L, Aug. 19, 1999, at 1 (same).

83. See *Ntakirutimana*, 184 F.3d at 422-23; see also *In re Surrender of Ntakirutimana*, No. CIV.A.L-98-43, 1998 WL 655708, at *1 (S.D. Tex. Aug. 6, 1998) (discussing factual background of case).

84. See *In re Ntakirutimana*, 1998 WL 655708, at *1.

85. See *Ntakirutimana*, 184 F.3d at 423 (discussing area where events pertaining to crime took place).

86. See *id.* (describing first request for surrender).

87. See *id.* (discussing National Defense Authorization Act of 1996 and setting forth reasons first request for surrender was denied).

88. See *In re Ntakirutimana*, 1998 WL 655708, at *2. The Government added two declarations to establish the probable cause needed to sustain the charges in the tribunal's indictments. See *id.*

89. See *Ntakirutimana*, 183 F.3d at 423. The district court found that the Constitution sets forth no specific requirements for extradition. See *In re Ntakirutimana*, 1998 WL 655708, at *2. The court further held that the Supreme Court has indicated its approval of extraditions made in the absence of a treaty and that there is precedent wherein fugitives were extradited pursuant to statutes that filled the gap left by a treaty provision. See *id.* The court held that the evidence brought forth by the Government sufficed to establish probable cause for the charges against Ntakirutimana. See *id.* at *8.

request for surrender.⁹⁰ The district court denied his habeas corpus petition, and Ntakirutimana appealed to the United States Court of Appeals for the Fifth Circuit.⁹¹

Ntakirutimana appealed the district court's decision alleging that: (1) the Constitution of the United States requires an Article II treaty for the surrender of a person to the ICTR; (2) the request for surrender does not establish probable cause; (3) the United Nations Charter does not authorize the Security Council to establish the ICTR; and (4) the ICTR is not capable of protecting fundamental rights guaranteed by the United States Constitution and international law.⁹²

IV. ANALYSIS

A. *Narrative Analysis*

The Fifth Circuit, in reviewing the decision of the district court, addressed only the first two issues raised by Ntakirutimana on appeal.⁹³ The issues addressed by the court were whether the Constitution requires an Article II treaty for the surrender of a person to the ICTR and whether the request for surrender establishes probable cause.⁹⁴ The court refused to review the remaining two issues raised by Ntakirutimana: whether the United Nations Charter authorizes the Security Council to establish the ICTR and whether the ICTR is capable of protecting fundamental rights guaranteed by the United States Constitution and international law.⁹⁵

1. *The Requirement of an Article II Treaty for Extradition*

Ntakirutimana posited a number of arguments in raising the issue of whether the Constitution requires an Article II treaty for extradition.⁹⁶ First, he argued that the language of the Constitution specifically requires an Article II treaty for extradition.⁹⁷ Second, Ntakirutimana raised the argument that it was the intent of the Framers to require a treaty for extradition.⁹⁸ Third, he argued that it is historical practice to require a treaty to extradite, in that a person has never been extradited in the absence of an Article II treaty.⁹⁹ Fourth, Ntakirutimana argued that the failure to require a treaty is a violation of separation of powers.¹⁰⁰ Fifth, Ntakirutimana asserted that a statute cannot usurp the treaty-making power of

90. *See Ntakirutimana*, 184 F.3d at 419 (stating that Ntakirutimana filed habeas corpus petition).

91. *See id.* (noting that habeas corpus petition was denied).

92. *See id.* (listing reasons Ntakirutimana appealed).

93. *See id.*

94. *See id.* at 424-27

95. *See id.* at 427-30

96. *See id.* at 424-27

97. *See id.* at 424

98. *See id.* at

99. *See id.* at 426

100. *See id.*

Article II.¹⁰¹ Finally, he argued that by not requiring an Article II treaty for extradition, the treaty-making power is read out of the Constitution.¹⁰²

a. Text of the Constitution

In reviewing this issue, the Fifth Circuit first examined the United States Constitution.¹⁰³ Ntakirutimana argued that according to Article II, Section 2, Clause 2, a treaty is required to extradite.¹⁰⁴ Upon examination of this provision of the Constitution, the court found that it does not contain specific language referring to extradition or to the necessity of a treaty in order to extradite.¹⁰⁵

The court then turned to decisions of the Supreme Court.¹⁰⁶ The court found that the power to surrender a fugitive to a foreign country is contained within the President's foreign relations power.¹⁰⁷ Relying on the Supreme Court's decision in *Valentine*, the Fifth Circuit qualified the executive's power to surrender fugitives.¹⁰⁸ In *Valentine*, the Court held that the power to surrender is not unlimited.¹⁰⁹ Rather, the power to extradite must be granted by law, either through an act of Congress or by the terms of a treaty.¹¹⁰ The Court further qualified the executive's power to extradite by stating that the statute or treaty must confer the power, it is

101. *See id.*

102. *See id.* at 427

103. *See id.* at 424. Because Ntakirutimana's challenge to the constitutionality of the statute is a challenge to the committing court's jurisdiction, the court reviewed the issue of constitutionality de novo. *See id.* (citing *Manrique Carreno v. Johnson*, 899 F. Supp. 624, 629 (S.D. Fla. 1995)).

104. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."); *see also* *Ntakirutimana*, 184 F.3d at 424.

105. *See Ntakirutimana*, 184 F.3d at 424 (examining language of United States Constitution).

106. *See id.* (examining Supreme Court decisions).

107. *See id.* ("The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." (quoting *Terlinden v. Ames*, 184 U.S. 270, 289 (1902))).

108. *See Valentine v. United States*, 299 U.S. 5, 18 (1936) (holding that power to extradite must be conferred on executive by treaty or act of Congress). The Supreme Court in *Valentine*, in reaching its holding, first stated that the power of the executive to extradite fugitives must be conferred by treaty or by act of Congress. *See id.* at 7. After establishing this principle, the Court examined the legislative provision relating to extradition. *See id.* at 9. The Court found that the provision merely defines the procedures to be followed when there is an extradition treaty or act of Congress in existence. *See id.* The provision should not be construed as conferring power on the executive to surrender a fugitive in the absence of a specific grant of power to do so. *See id.* at 10.

109. *See id.* at 8 (noting that although power to extradite is national power, it must be granted by treaty or legislative provision).

110. *See id.* at 9 (examining whether legislative provision conferring authority to extradite existed). The Court found that although there was a statutory provision referring to extradition, the provision did not explicitly confer power on the executive to extradite. *See id.*

insufficient for the statute or treaty to simply not deny the power to surrender.¹¹¹

The United States does not have an extradition treaty with Rwanda.¹¹² Hence, in order for the executive to have the power to surrender, there must be a statute conferring the authority.¹¹³ According to *Valentine*, the use of the executive-congressional agreement to extradite Ntakirutimana is a constitutional use of power.¹¹⁴ The court rejected Ntakirutimana's attempts to distinguish his case from *Valentine* by pointing to the lack of a treaty between Rwanda and the United States.¹¹⁵ The court also dismissed Ntakirutimana's assertion that *Valentine* challenged the congressional authority to provide for the extradition of fugitives in the absence of a treaty.¹¹⁶ The court held that although there is a limit on the President's power to surrender a fugitive, there is no such limit on Congress' power to provide for extradition.¹¹⁷

b. Intent of the Framers

Failing on his previous arguments, Ntakirutimana made an independent argument that his interpretation of the Constitution was in line with the intent of the Framers.¹¹⁸ He argued that the drafters of the Constitution intended for the executive to negotiate agreements with foreign powers and for the Senate to review the agreements as an exercise of the checks and balances system.¹¹⁹ The Fifth Circuit dismissed this argument,

111. *See id.* at 10 (stating that treaty did not confer power to surrender). In *Valentine*, there was an extradition treaty in force between France and the United States. *See id.* at 6. France had requested the extradition of two United States citizens found guilty of committing crimes in France. *See id.* The Court examined the language of the extradition treaty to determine whether the treaty conferred power on the executive to surrender one of its own citizens. *See id.* at 10. The Court found that the treaty contained explicit language stating that neither country shall be bound to surrender its own citizens. *See id.* The Court also stated that although, as a general rule, it is desirable to liberally construe the obligations of treaties to give effect to the apparent intention of the parties, this is no substitute for authority conferred by the law. *See id.* The Court held that denying an obligation is not equivalent to a grant of power. *See id.*

112. *See Ntakirutimana*, 184 F.3d at 421-24 (stating that issue before court is whether executive-congressional agreement is constitutional because there is not relevant treaty in effect).

113. *See id.* at 425 (stating that based on holding in *Valentine*, court should look to treaty or statute for authority to extradite).

114. *See id.* (holding that use of executive-congressional agreements to extradite is constitutional).

115. *See id.* (rejecting Ntakirutimana's attempts to distinguish his case from *Valentine*).

116. *See id.* (dismissing Ntakirutimana's assertion).

117. *See id.* (citing *Valentine v. United States*, 299 U.S. 5, 9 (1936), for proposition that no limit exists on Congress' power).

118. *See id.* (discussing Ntakirutimana's argument that his interpretation of Constitution is in line with intent of drafters).

119. *See id.* (discussing intent of Framers to establish system of checks and balances).

holding that it failed because it is based on the assumption that a treaty is required for an international agreement.¹²⁰

c. Historical Practice

Ntakirutimana based his third argument on historical practice.¹²¹ Citing *Valentine*, he argued that the United States has never surrendered a person in the absence of an Article II treaty.¹²² Furthermore, he posited that according to *Valentine* the only involuntary transfers without an extradition treaty have been to a foreign country or territory occupied by or under the control of the United States.¹²³ The Fifth Circuit refuted this argument by referring to the Court's analysis in *Valentine*.¹²⁴ In that case, although reference was made to this historical practice, the Supreme Court did not suggest that it limited Congress' power.¹²⁵ The Fifth Circuit suggested instead that if historical practice tells us anything, it is that there is a historical understanding that Congress may exercise the power to extradite by statute.¹²⁶

120. See *id.* In dismissing this argument, the court points to the validity of executive agreements, and the necessity of the President to enter into binding agreements with foreign nations. See *id.* at 426. For a discussion of the constitutionality of executive agreements and executive-congressional agreements, see *supra* notes 33-36 and accompanying text.

121. See *Ntakirutimana*, 184 F.3d at 426 (stating Ntakirutimana's third argument).

122. See *id.* (citing *Valentine*, 299 U.S. at 9 for proposition that fugitive has never been surrendered without Article II treaty).

123. See *id.* (noting Ntakirutimana's argument that involuntary transfers only occur in limited situations).

124. See *id.* (discussing analysis of Court in *Valentine*). For a discussion of the facts and holding of *Valentine*, see *supra* note 37 and accompanying text.

125. See *id.* In its analysis, the Court in *Valentine* quoted John Bassett Moore from his treatise on extradition: "the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Valentine*, 299 U.S. at 8-9 (citing MOORE, *supra* note 49, at 21). The Court held that precedent clearly did not place a limit on Congress' power. See *id.* at 9 (noting historical practice). Rather, examining precedent shows that extradition in accordance with a treaty or a legislative provision is valid. See *id.* (stating that proceedings against individual must be authorized by law).

126. See *Ntakirutimana*, 184 F.3d at 426 (noting historical practice). Supreme Court precedent illustrates a historical understanding that Congress may extradite by statute. See, e.g., *Valentine*, 299 U.S. at 18 ("[W]e . . . hold that [the President's] power, in the absence of statute conferring an independent power, must be found in the terms of the treaty . . ."); *Grin v. Shine*, 187 U.S. 181, 191 (1902) ("But notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect . . ."); *Terlinden v. Ames*, 184 U.S. 270, 289 (1902) ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision."). The Fifth Circuit further posited that the historical understanding that Congress may extradite by statute exists irrespective of the fact that Congress has rarely exercised the power to do so. See *Ntakirutimana*, 184 F.3d at 426. Furthermore, the Fifth Circuit pointed to *Hilario v. United*

d. Separation of Powers

Ntakirutimana further contended that not requiring an Article II treaty for extradition constitutes a violation of the Constitution's separation of powers.¹²⁷ He asserted that in the absence of a treaty requirement, the President has the power to unilaterally conclude agreements with foreign governments.¹²⁸ He also contended that Congress has the power to legislate foreign affairs, a power enumerated in the Constitution as belonging to the executive.¹²⁹

The Fifth Circuit held that Ntakirutimana's argument was without merit.¹³⁰ The Supreme Court has recognized the President's authority to enter into executive agreements.¹³¹ Through the exercise of this power, the President can unilaterally conclude agreements with foreign governments.¹³² Furthermore, this case deals with an executive-congressional agreement.¹³³ This type of agreement is concluded through the joint acts

States, 854 F. Supp. 165, 168 (E.D.N.Y. 1994), in which the court held that even in a case where the fugitive would not be extraditable under the specific terms of the treaty, a fugitive may be extradited pursuant to a statute that "filled the gap" in the treaty. See *Ntakirutimana*, 184 F.3d at 426. Thus, the court concluded that although historical practice has been to extradite according to a treaty, this does not preclude extradition pursuant to a legislative provision. See *id.*

127. See *Ntakirutimana*, 184 F.3d at 426 (discussing Ntakirutimana's various arguments concerning constitutionality of grant of surrender request without Article II treaty). The doctrine of separation of powers suggests that there are three separate, but coordinated branches, each having independent power. See Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 534-37 (1974) (discussing real meaning of separation of powers). The purpose of the separation of powers doctrine is "to require the joint participation—the co-operation and concurrence—of the several branches in the making and carrying out of any genuinely critical decision." *Id.* at 535. It was the intent of the Framers for each branch of the government to serve as a check on the other branches of government. See *id.* at 536-37. In the area of foreign affairs the purpose served by the separation of powers doctrine is to ensure that "the making and carrying out of foreign policy is not the prerogative of any one branch of government." *Id.* at 538. See generally Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976) (discussing at length separation of powers.)

128. See *Ntakirutimana*, 184 F.3d at 426.

129. See *id.*

130. See *id.*

131. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (recognizing President's power to enter into executive agreements); *United States v. Pink*, 315 U.S. 203, 229 (1942) (upholding validity of executive agreements); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (recognizing that certain international agreements can be concluded on sole authority of President); *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1911) (upholding validity of international agreements concluded without advice and consent of Senate).

132. For a discussion of the President's ability to unilaterally conclude agreements with foreign governments, see *supra* note 128 and accompanying text.

133. See *Ntakirutimana*, 184 F.3d at 422 (discussing executive-congressional agreement with ICTR).

of the executive and congressional branches.¹³⁴ The President does not act unilaterally, nor does Congress negotiate with foreign countries.¹³⁵ Therefore, the question of separation of powers does not arise.¹³⁶

e. A Statute Versus the Treaty-Making Power

Ntakirutimana's argument that a statute cannot usurp the treaty-making power of Article II has been refuted since *Whitney v. Robertson*.¹³⁷ In that case, the Supreme Court held that a statute can usurp a treaty.¹³⁸ Known as the "last in time" rule, it stands for the proposition that if a statute and treaty are inconsistent, then the last in time will prevail.¹³⁹ The Fifth Circuit extrapolated from this holding that if the Supreme Court assumes that a statute and a treaty can be inconsistent, then there

134. *See id.* at 426 (stating method for concluding executive-congressional agreements).

135. *See id.* (noting that President does not act unilaterally and Congress does not negotiate with foreign countries).

136. *See generally* Bestor, *supra* note 127 (discussing separation of powers). A violation of separation of powers occurs when one branch of the government impinges upon the functions of another. *See* Levi, *supra* note 127, at 382 (discussing what constitutes violation of separation of powers). Attorney General Levi made two points in his article:

First, whether power has been rightly exercised, or exercised within the limits the Constitution defines, is not always a problem of separation of powers. Some powers have been confided to no branch. Abuse of power in that context may mean that the limes should be enforced on all branches of government, not that the power is better conferred on and exercised by a branch other than that which has abused it. A corollary of this is that a weakness in one branch of the government is not always best corrected by weakening another branch.

Second, and perhaps most remarkable, is that the cases which to some extent define the allocation of power among the branches are relatively few. That fact is a testament to the respect that each branch generally has maintained for the powers and responsibilities of the others, and to an understanding that each branch, within its sphere, represents and serves the people's interest.

Id. at 385-86.

137. 124 U.S. 190, 194 (1888) (holding that if there is treaty and statute dealing with same subject then last in time will prevail, if treaty is self-executing). In *Whitney*, a legislative provision was enacted subsequent to a treaty, both dealing with the same subject. *See id.* at 193-94. The provisions of the statute conflicted with the provisions of the treaty. *See id.* at 191. The Court held that "[b]y the Constitution of the United States a treaty and a statute are placed on the same footing, and if the two are inconsistent, the one last in date will control, provided the stipulation of the treaty on the subject is self-executing." *Id.* at 190. In recognizing that a statute and treaty can be inconsistent, the Court was in effect recognizing that there can be a statute and treaty dealing with the same subject. *See Ntakirutimana*, 184 F.3d at 426 (determining from Court's analysis in *Whitney* that there can be statute and treaty dealing with same subject).

138. *See Whitney*, 124 U.S. at 194 (holding that statute can usurp treaty).

139. *See id.* (holding that "if the two are inconsistent, the one last in date will control the other").

can be a statute and a treaty that cover the same subject.¹⁴⁰ Therefore, the executive-congressional agreement at issue, codified in the statute, was a valid exercise of authority.¹⁴¹

f. The Treaty Power is not Affected

Finally, Ntakirutimana argued that by not requiring a treaty for extradition, the treaty-making power is read out of the Constitution.¹⁴² The Fifth Circuit found that this argument had no legal basis.¹⁴³ Not requiring a treaty does not affect the treaty-making power contained in the Constitution.¹⁴⁴ It only means that the President has discretion to determine whether to submit a negotiated treaty to the Senate for ratification or to submit legislation to Congress.¹⁴⁵ Utilizing one method instead of the other does not affect the power of the President to use the other method at a subsequent time.¹⁴⁶ In fact, should the President choose to submit legislation to Congress instead of submitting a treaty for ratification, Congress may refuse to consider the legislation and insist that the agreement be submitted as a treaty instead.¹⁴⁷ Therefore, in refuting all of Ntakirutimana's arguments, the court concluded that it is not unconstitutional to surrender Ntakirutimana to the ICTR pursuant to the executive-congressional agreement.¹⁴⁸

2. *Failure to Establish the Requisite Probable Cause for Surrender*

The second issue brought by Ntakirutimana, and addressed by the Fifth Circuit on appeal, was whether the district court erred in dismissing his habeas corpus petition.¹⁴⁹ In extradition proceedings, the evidence must be sufficient to meet a constitutional probable cause standard.¹⁵⁰ Under the terms of the executive-congressional agreement, the ICTR is required to present "information sufficient to establish that there is a reasonable basis to believe that the person sought has committed the viola-

140. See *Ntakirutimana*, 184 F.3d at 427 (interpreting Supreme Court's holding in *Whitney*).

141. See *id.* (holding that executive-congressional agreement is constitutional).

142. See *id.* (setting forth Ntakirutimana's final argument).

143. See *id.* (finding no legal basis for Ntakirutimana's argument).

144. See *id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1986)).

145. See *id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1986)).

146. See *id.* (noting that using one method over another does not affect method not chosen).

147. See *id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1986)).

148. See *id.* (stating holding).

149. See *id.* (presenting second issue).

150. See *id.* (describing what constitutes sufficiency of evidence). For a discussion of the constitutional probable cause standard, see *supra* notes 60-66 and accompanying text.

tion or violations for which surrender is requested.”¹⁵¹ The Fifth Circuit held that the committing court, in this case the district court, must only determine whether probable cause exists to sustain the charges.¹⁵² The committing court must make this determination based on the weight and sufficiency of the evidence.¹⁵³ This determination is not a finding of fact because the court does not weigh the evidence in order to resolve factual disputes.¹⁵⁴

The function of the Fifth Circuit on habeas corpus review was limited to a determination of whether there was any competent evidence in the record to support a finding of probable cause.¹⁵⁵ The circuit court examined evidence presented to the district court and found that all of the documents were admissible as required by 18 U.S.C. § 3190.¹⁵⁶ The first

151. *Ntakirutimana*, 184 F.3d at 427 (citing *Agreement*, *supra* note 6, art. 2, cl. 3).

152. *See id.* (citing *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980)).

153. For a discussion of the probable cause standard in extradition proceedings, see *supra* notes 60-66 and accompanying text.

154. For a discussion of the probable cause standard in extradition proceedings, see *supra* notes 60-66 and accompanying text.

155. *See Collins v. Loisel*, 259 U.S. 309, 314-15 (1922) (stating that function of Court is to determine if there is competent legal evidence); *Charlton v. Kelly*, 229 U.S. 447, 460 (1913) (noting Court's function of determining sufficiency of evidence); *McNamara v. Henkel*, 226 U.S. 520, 523 (1913) (“The question simply is whether there was any competent evidence before the Commissioner entitling him to act under the statute.”); *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980) (noting function of court is to determine if evidence is sufficient to constitute probable cause); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971) (stating that function of habeas corpus petition is to determine if competent evidence exists to support finding of probable cause).

156. *See Ntakirutimana*, 184 F.3d. at 427 (noting circuit court's finding of admissibility). The evidence presented at the extradition hearing consisted of three documents. *See id.* (noting evidence). The first document was the declaration of Arjen Mostert, a police officer from Holland employed as an investigator for the Tribunal in 1996. *See In re Surrender of Ntakirutimana*, No. CIV.A.L-98-43, 1998 WL 655708, at *18 (S.D. Tex. Aug. 6, 1998) (describing Mostert). His declaration consisted of the testimony of 12 witnesses who claimed to have firsthand knowledge of Ntakirutimana's participation in or planning of the attacks. *See Ntakirutimana*, 184 F.3d at 427 (noting content of testimony). A challenge to his declaration by both Ntakirutimana and the magistrate judge led Mostert to later qualify his declaration by removing the testimony of two witnesses who had provided only general information. *See In re Ntakirutimana*, 1998 WL 655708, at *18 n.7 (describing supplemental declaration). Mostert's declaration set forth the factual background of the events in Rwanda during the 1994 civil war. *See id.* at *18 (describing tensions and circumstances precipitating civil war). It also set forth specific evidence that Ntakirutimana committed the genocidal crimes with which he was charged. *See id.* (describing evidence).

The remaining two documents were included as evidence in the second request for surrender. *See Ntakirutimana*, 184 F.3d at 428 (discussing declarations). The documents were added as a response to the first committing court's finding that the evidence was insufficient to establish probable cause. *See id.* (noting that additional declarations sustained probable cause requirement). The second document was the declaration of Pierre-Richard Prosper, an assistant trial attorney for

committing court held that the evidence was inadequate to establish probable cause.¹⁵⁷ Thus, the Fifth Circuit closely examined the documents presented to the second committing court that were used to supplement the Government's evidence, and which served as the basis for the grant of surrender.¹⁵⁸

Ntakirutimana challenged the credibility of the evidence, arguing that the evidence presented against him lacked probative force and was unreliable.¹⁵⁹ The Fifth Circuit found that the credibility of the evidence was an issue properly reviewable by the magistrate judge rather than by a habeas corpus petition.¹⁶⁰ The court held that it would not review the district court's conclusion as to the credibility of the witnesses.¹⁶¹

The Fifth Circuit noted that the evidence had to reach the standard of probable cause.¹⁶² Without examining the credibility of the evidence presented, the court held that the evidence in the record established probable cause that Ntakirutimana was guilty of the crimes against him.¹⁶³

B. Critical Analysis

1. *Constitutionality of the Executive-Agreement with the ICTR*

The first issue addressed by the Fifth Circuit was whether an Article II treaty is required for extradition.¹⁶⁴ Ntakirutimana challenged the validity of the executive-congressional agreement entered into with the ICTR, which provided for the extradition of fugitives found on United States territory.¹⁶⁵ The court correctly held that the executive agreement signed by the President with the ICTR was a valid exercise of Presidential author-

the Office of the Prosecutor for the Tribunal. *See id.* (describing Prosper). The third document was the declaration of a former Assistant United States Attorney for the Central District of California. *See In re Ntakirutimana*, 1998 WL 655708, at *18. All three documents were authenticated by either the Ambassador of the United States at Kigali, Rwanda, the site of the prosecutor for the ICTR, or the Ambassador of the United States to the Netherlands, where the prosecutor is based, in accordance with the terms of the congressional-executive agreement. *See* Defense Authorization Act of 1996, Pub. L. No. 104-106, § 1342(a)(2), 110 Stat. 486 (1996); *see also In re Ntakirutimana*, 1998 WL 655708, at *18 (recognizing authenticity of declarations).

157. *See Ntakirutimana*, 184 F.3d at 428 (noting first committing court's holding).

158. *See id.* (examining evidence submitted to first committing court). For a discussion of the evidence submitted to the first and second committing courts, see *supra* note 156 and accompanying text.

159. *See Ntakirutimana*, 184 F.3d at 428 (describing Ntakirutimana's challenge to credibility of evidence).

160. *See id.* at 429 (noting finding as to credibility).

161. *See id.* (noting finding as to credibility).

162. *See id.* at 427 (noting probable cause requirement).

163. *See id.* at 429 (noting evidence met probable cause requirement).

164. *See id.* at 424 (setting out first issue).

165. *See id.* (noting Ntakirutimana's challenge to validity of executive-congressional agreement).

ity.¹⁶⁶ The court was also correct in finding that the subsequent legislation passed by Congress to implement the agreement was a legitimate exercise of congressional authority.¹⁶⁷ Thus, the Fifth Circuit was correct in holding that an Article II treaty is not required for extradition.¹⁶⁸

The Fifth Circuit first examined the specific language of Article II to determine whether it specifically required a treaty for extradition.¹⁶⁹ The court relied on the Supreme Court decision of *Terlinden v. Ames*¹⁷⁰ to conclude that a treaty is not required to extradite.¹⁷¹ In *Terlinden*, the Court held that the power to extradite is included within the foreign relations power of the President, irrespective of the fact that the treaty clause does not expressly refer to extradition.¹⁷²

The Court in *Valentine*, however, qualified the President's power to extradite by stating that the extradition of fugitives must be authorized by law.¹⁷³ The focus of the Court's analysis in *Valentine* differed from the Fifth Circuit's analysis in *Ntakirutimana* because in *Valentine* there existed a controlling treaty.¹⁷⁴ The constitutionality of the extradition request was not being challenged.¹⁷⁵ Rather, it was the interpretation of a specific provision of the treaty that was in dispute.¹⁷⁶ Nevertheless, in addressing

166. For a discussion of the President's authority to enter into executive agreements and the validity of such agreements, see *supra* notes 1, 37 and accompanying text.

167. For a discussion of the validity of a legislative provision authorizing extradition, see *supra* note 41 and accompanying text.

168. For a discussion of whether an Article II treaty is required for extradition, see *supra* notes 108-09 and accompanying text.

169. See *Ntakirutimana*, 184 F.3d at 424 (indicating examination of Article II language).

170. 184 U.S. 270 (1902).

171. See *Ntakirutimana*, 184 F.3d at 424 (relying on *Terlinden v. Ames*, 184 U.S. 270 (1902)).

172. See *Terlinden*, 184 U.S. at 289 ("The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers.").

173. See *Valentine v. United States*, 299 U.S. 5, 8 (1936) (stating that power to extradite must be conferred by law). The Supreme Court in *Valentine* stated:

The desirability—frequently asserted by the representatives of our Government and demonstrated by their arguments and the discussions of jurists—of providing for the extradition of nationals of the asylum state is not a substitute for constitutional authority. The surrender of its citizens by the Government of the United States must find its sanction in our law.

174. *Id.*

See *id.* at 6 (indicating existence of controlling treaty). The treaty under review in *Valentine* was the Treaty of 1909 between the United States and France. See *id.*

175. See *id.* (noting that constitutionality of treaty was not being challenged).

176. See *id.* (indicating dispute in treaty interpretation). The respondents in *Valentine* were not challenging the constitutionality of their extradition, but rather the validity of their extradition pursuant to the Treaty of 1909. See *id.* (describing issue). The controlling provisions of the treaty are articles I and V. Article I states:

The Government of the United States and the Government of France mutually agree to deliver up persons who, having been charged with or

the issue, the *Valentine* Court began its analysis by stating that extradition is valid as long as there is a conventional or legislative provision conferring the authority.¹⁷⁷ Thus, the Fifth Circuit correctly applied the *Valentine* analysis in holding that the executive agreement signed by the President with the ICTR, and later implemented by Congress, was constitutional.¹⁷⁸

2. *Sufficiency of the Evidence to Establish Probable Cause*

The second issue addressed by the Fifth Circuit was whether the district court erred in denying Ntakirutimana's petition for a writ of habeas corpus.¹⁷⁹ The Fifth Circuit, in affirming the district court, based its decision on Supreme Court precedent.¹⁸⁰ On this basis, the circuit court's

convicted of any of the crimes or offences specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other: Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offence had been there committed.

Id. at 6-7. Article V of the Treaty of 1909 states: "Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." *Id.* at 7. The *Valentine* Court found that the language of the treaty expressly forbid the United States to surrender its citizens. *See id.* at 8.

177. *See id.* at 8 (stating "albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision").

178. *See id.* (indicating correct application of analysis). The Supreme Court in *Valentine* expressly held that extradition must be based on law and that the law can be conferred by treaty or legislative provision. *See id.* (holding that extradition must have basis in law). In *Ntakirutimana*, the court upheld the validity of the executive-congressional agreement upon which Ntakirutimana's extradition was based. *See Ntakirutimana v. Reno*, 184 F.3d 419, 425 (5th Cir. 1999) (upholding validity of agreement). In doing so, the Fifth Circuit recognized the validity of executive agreements. *See id.* ("*Valentine* indicates that a statute suffices to confer authority on the President to surrender."). The court's holding was correct because the Supreme Court has repeatedly upheld the validity of executive agreements. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (recognizing President's power to enter into executive agreements without obtaining advice and consent of Senate); *Banco Nacional de Cuba v. L. F. Sabbatino*, 376 U.S. 398, 462 (1964) (recognizing validity of executive agreements); *Reid v. Covert*, 354 U.S. 1, 15 (1957) (upholding executive agreement in process of handing down judgment in case); *United States v. Pink*, 315 U.S. 203, 229 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States . . ."); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (recognizing that not all international agreements are treaties that require participation of Senate); *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912) (recognizing that certain international compacts do not require advice and consent of Senate). The Fifth Circuit based the rest of its holding on the Supreme Court precedent handed down in *Valentine*. *See Ntakirutimana*, 184 F.3d at 425-26 (relying on *Valentine*, 299 U.S. 5).

179. *See Ntakirutimana*, 184 F.3d at 427 (addressing second issue).

180. *See id.* (basing decision on Supreme Court precedent). As to the second issue, the Fifth Circuit held that the weight of the evidence could not be reviewed by a habeas corpus petition. *See id.* (noting constitutional probable cause standard

holding was authoritative.¹⁸¹ The underlying factors motivating the court, however, cast doubt upon the validity of its decision.¹⁸²

In *Loisel*, the Supreme Court held that habeas corpus review is limited to a determination of whether the evidence was sufficient to establish probable cause.¹⁸³ The weight and sufficiency of the evidence is not reviewable because this would result in the reviewing court engaging in fact finding.¹⁸⁴ Thus, the Fifth Circuit based its refusal to examine the credibility of the evidence on precedent.¹⁸⁵

The challenge brought by Ntakirutimana concerned the credibility of the witnesses' testimony.¹⁸⁶ The Fifth Circuit refused to examine the testimony, stating that this would place an unreasonable burden on the courts and impair the extradition process.¹⁸⁷ The underlying issues motivating the court in its decision requires a reexamination of the court's finding.

The request of Ntakirutimana's surrender marked the first time the United States was asked to extradite a fugitive to the Rwandan tribunal.¹⁸⁸

for sufficiency of evidence). In so holding, the court relied on the Supreme Court case of *Collins v. Loisel*. See *id.* (citing *Collins v. Loisel*, 259 U.S. 309 (1922)).

181. See *id.* (basing decision on Supreme Court precedent).

182. See *id.* at 430-31 (Parker, J., concurring) (casting doubt upon validity of court's decision).

183. See *Loisel*, 259 U.S. at 316 ("The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction."). At issue in *Loisel* was the denial of a habeas corpus petition, filed after the fugitive was arrested on extradition proceedings. See *Collins v. Miller*, 252 U.S. 364, 365 (1920) (setting forth proceedings and nature of controversy). The Court held that it was not its function to determine if the fugitive was guilty, but rather to determine if the evidence justified surrendering him to the foreign jurisdiction. See *Loisel*, 259 U.S. at 315-16 (holding that court should determine whether evidence justifies extradition).

184. See *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir. 1981) ("The district judge [on habeas corpus] is not to retry the magistrate's case."). The scope of review on habeas corpus is very narrow and looks to little more than jurisdiction. See *id.* The Supreme Court has stated that it is not necessary in an extradition proceeding for "every technical detail . . . to be proved beyond a reasonable doubt." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). The Supreme Court in *Fernandez* further stated that habeas corpus is:

not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Id.

185. For a discussion of Supreme Court precedent concerning the role of the court on habeas corpus review, see *supra* notes 179-84 and accompanying text.

186. See *Ntakirutimana*, 184 F.3d at 428 (noting challenge).

187. See *id.* at 429 (citing *Loisel*, 259 U.S. at 316 and *Eain*, 641 F.2d at 511).

188. See *Harris & Kushen*, *supra* note 6, at 561 (noting that Ntakirutimana was first person requested for surrender by ICTR). The fact that Ntakirutimana was the first person that the international criminal tribunal requested be surrendered was well documented by the press. See, e.g., Crossette, *supra* note 82, at A10 ("His

Because the United States was instrumental in forming the tribunal, the legal impediments to Ntakirutimana's extradition have proven to be an embarrassment to the United States.¹⁸⁹ Extraditing Ntakirutimana to the ICTR would exemplify the United States' willingness to cooperate with the tribunal.¹⁹⁰ This showing of the United States' cooperation with the tribunal is important because it would support the United States' effort to encourage cooperation with the tribunal.¹⁹¹

The credibility of the witnesses' testimony is questionable for a variety of reasons. First, eleven of the twelve witnesses were members of the Tutsi tribe.¹⁹² Thus, as members of the rival tribe, the witnesses were biased in their account of the events that occurred during the Rwandan civil war.¹⁹³ Second, eleven of the twelve witnesses spoke Kinyarwanda, Rwanda's native language, but the interviews were conducted through translators of English and French.¹⁹⁴ This disparity in the languages used to conduct the interviews brings into question the reliability of the witnesses' testimony.¹⁹⁵ Finally, Ntakirutimana has been a pastor for most of his life and

deportation to the International Criminal Tribunal for Rwanda . . . would be the first such action by the United States."); Nathan Koppel, *Court Oks Rwandan's Extradition; No Treaty Required Under Constitution*, TEX. LAW., Aug. 16, 1999, at 1 ("Ntakirutimana also marks the first time the United States has been asked to surrender someone to either of the two tribunals prosecuting war criminals . . ."); Patty Reinert, *Appeals Court Says Pastor Must be Turned Over to Rwandan Tribunal*, Hous. CHRON., Aug. 6, 1999, at A42 ("If Ntakirutimana is extradited, it will be the first time the United States has surrendered a defendant from America to a U.N. tribunal."); *Rights-Rwanda: Activists Praise U.S. Ruling on Genocide Suspect*, INTER PRESS SERV., Aug. 6, 1999, at 1 ("It sets an important . . . precedent as Mr. Ntakirutimana is the first person that the United States has been asked to surrender to either of the international criminal tribunals."). This is an indication of the importance placed on the United States' cooperation with the tribunal's request. Since its establishment, the tribunal has sentenced 38 war crimes suspects, including the former Rwandan Prime Minister Jean Kambanda, who it sentenced to life imprisonment. See *id.*

189. See Crossette, *supra* note 82, at A10 ("Legal hurdles over the last three years to prevent Mr. Ntakirutimana's deportation have been an unexpected embarrassment to the Clinton Administration. The United States had been instrumental in forming the tribunal in 1994 . . .").

190. See Koppel, *supra* note 188, at 1 (noting that precedent is set by cooperating with tribunal, as well as showing willingness to honor requests for surrender).

191. See *id.* (noting likely result of extradition of Ntakirutimana).

192. See *Ntakirutimana*, 184 F.3d at 427 (stating that, of 12 witnesses, all but one were Tutsi and 10 claimed Seventh Day Adventist as their religion).

193. See *id.* at 430 (Parker, J., concurring) (concurring in judgment but noting that "[t]he evidence supporting the request is highly suspect").

194. See *id.* at 428 n.16 (noting that most witnesses spoke Rwanda's native language).

195. See *id.* at 430-31 (Parker, J., concurring) ("Affidavits of unnamed Tutsi witnesses acquired during interviews utilizing questionable interpreters in a political environment that has all the earmarks of a campaign of tribal retribution raises serious questions regarding the truth of their content."). The Fifth Circuit held that it would presume that the translations were correct and refused to address Ntakirutimana's argument concerning the credibility of the translations. See *id.* at 430 (holding same). The court stated that "[t]he extradition court need not

is married to a Tutsi.¹⁹⁶ It seems implausible that he would suddenly turn to violence and commit the atrocious crimes of which he is accused.¹⁹⁷ Therefore, the motivation of the Fifth Circuit in holding that the evidence was sufficient to establish probable cause seems political rather than judicial.¹⁹⁸

V. IMPACT

The Fifth Circuit's holdings in *Ntakirutimana* set forth both positive and negative precedents for the future extradition of fugitives to criminal tribunals.¹⁹⁹ The court correctly examined and applied Supreme Court precedent concerning what an extradition request should be filed pursu-

independently inquire into the accuracy of the translations submitted with a formal extradition request, because '[s]uch a requirement would place an unbearable burden upon extradition courts and seriously impair the extradition process.'" *Id.* (quoting *Tang Yee-Chun v. Immundi*, 686 F. Supp. 1004, 1009 (S.D.N.Y. 1987)).

196. *See id.* at 431 (Parker, J., concurring) (noting facts).

197. *See id.* (Parker, J., concurring) (addressing implausibility of commission of crimes). Justice Parker stated the following:

It defies logic, and thereby places in question the credibility of the underlying evidence, that a man who has served his church faithfully for many years, who has never been accused of any law infraction, who has for his long life been a man of peace, and who is married to a Tutsi would somehow suddenly become a man of violence and commit the atrocities for which he stands accused.

Id.

198. *See id.* (Parker, J., concurring) (noting political motivation for finding of probable cause). Justice Parker wrote separately because, although he believed that the law as laid out by the majority was correct, he questioned the validity of the evidence presented by the government. *See id.* ("The evidence . . . is highly suspect."). He expressed his concerns as follows:

I fully understand that the ultimate decision in this case may well be a political one that is driven by important considerations of State that transcend the question of guilt or innocence of any single individual. I respect the political process that necessarily is implicated in this case, just as I respect the fact that adherence to precedent compels my concurrence.

Id.

199. *See Kester*, *supra* note 59, at 1443 (positing that court decisions dealing with extradition need revamping). Kester maintains that court decisions dealing with the United States extradition doctrine and extradition procedures "have tended to repeat and misapply antique shibboleths without reexamining United States extradition doctrine and procedures in the light of modern developments in civil and criminal law." *Id.* This may be because most of the extradition cases are heard in the Second, Fifth, Ninth and Eleventh Circuits, which contain the major ports of entry into the United States, as well as some of the most aggressive United States Attorneys' offices. *See id.* at 1443 n.12 (noting dynamics of certain circuits in which extradition cases are most frequently heard). Most of the controlling Supreme Court cases dealing with extradition predate World War I. *See id.* at 1491. One of the most recent Supreme Court cases dealing with extradition was decided in 1916. *See Bingham v. Bradley*, 241 U.S. 511 (1916); *see also, e.g., Glucksman v. Henkel*, 221 U.S. 508 (1911); *Collins v. O'Neil*, 214 U.S. 113 (1909); *Johnson v. Browne*, 205 U.S. 309 (1907); *Grin v. Shine*, 187 U.S. 181 (1902); *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

ant to.²⁰⁰ In holding that an Article II treaty is not required for extradition, the court upheld the validity of the President's power to enter into international agreements providing for extradition.²⁰¹ Finding that the executive-congressional agreement with the ICTR is constitutional lent credence to the criminal tribunal.²⁰²

The Fifth Circuit's ruling on the probable cause issue, however, is a negative development. Although the court could justify its decision not to review the weight and sufficiency of the evidence, its decision to do so appears to have been motivated by political reasons.²⁰³ The fact that the overwhelming majority of the witnesses are members of the Tutsi tribe is a red flag that their statements as to Ntakirutimana's activities may be prejudiced.²⁰⁴ As members of the minority tribe, and the victims of genocide by the Hutu tribe, of which Ntakirutimana is a member, these witnesses clearly had an interest in seeing someone who they viewed as an enemy punished.

Another unsettling fact is that Ntakirutimana has been a pastor for most of his life and is married to a Tutsi.²⁰⁵ Ntakirutimana was never suspected of committing any crimes before these charges were brought against him.²⁰⁶ Furthermore, the fact that he married a Tutsi is evidence

Kester suggests that Congress could improve the situation through legislation and offers a few suggestions. See Kester, *supra* note 59, at 1443-91 (suggesting ways to improve situation). One possibility suggested by Kester follows:

It would be more forthright and dependable for Congress to enact a statute to provide for something closer to a mini-trial of the accused in the United States to test whether the accusations and evidence adequately approach United States standards, and also to consider whether the accused may really have an unanswerable defense.

Id. at 1447.

200. For a discussion of what constitutes a proper extradition request, see *supra* notes 165-79 and accompanying text.

201. See *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) (upholding executive agreements); *United States v. Pink*, 315 U.S. 203, 229 (1942) (same); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (same).

202. See *Kushen & Harris*, *supra* note 75, at 515 (stating that "the [United States' agreement] was intended to serve as an example for the international community").

203. See *Ntakirutimana v. Reno*, 184 F.3d 419, 427-30 (5th Cir. 1999) (setting forth Ntakirutimana's argument concerning failure of government to establish probable cause and court's analysis in refuting this argument). For a discussion of the court's holding as to Ntakirutimana's assertion that the evidence was not sufficient to establish probable cause, see *supra* notes 149-63 and accompanying text.

204. See *Ntakirutimana*, 184 F.3d at 428 n.16 (stating that eleven of twelve witnesses were Tutsi). The Hutu tribe was the majority tribe during the 1994 conflict. See *id.* at 421 (noting Hutu dominance). The Hutus and the Tutsis have historically been combatants and Ntakirutimana had a high-profile position in the Hutu tribe as leader of the Rwandan church. See *id.* at 422 (noting Ntakirutimana's position in tribe). Hence, because of the tension between the tribes and Ntakirutimana's position, the witnesses had great interest in seeing Ntakirutimana punished.

205. See *id.* at 430 (Parker, J., concurring) (noting facts).

206. See *id.* (noting Ntakirutimana's clear record).

that he does not feel ethnic hatred, the impetus for the commission of genocide, towards members of the Tutsi tribe.²⁰⁷

The most important consideration for the Fifth Circuit in ruling on this case in the manner in which it did seemed to be the preservation of the United States' influence in the international arena.²⁰⁸ The United States largely ignored evidence that crimes of genocide were being committed in Rwanda.²⁰⁹ As a result, the United States was instrumental in establishing the ICTR.²¹⁰ Should the United States refuse the extradition of a Rwandan citizen, and a Hutu to boot, other nations may also hesitate to comply with criminal tribunals in the future.²¹¹

The precedent established by the Fifth Circuit in *Ntakirutimana* may prove detrimental. Should courts view the decision in *Ntakirutimana* as free reign to decide cases with an international scope on the basis of the current political climate, the true guilt or innocence of any individual may be compromised. The courtroom is in jeopardy of becoming a forum where considerations of State, as opposed to the fundamental rights of individuals, are furthered.²¹²

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207. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277 (defining genocide as killing and other acts "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group").

208. See Cassel, *supra* note 72, at 5 ("If not reversed, this ruling will hamstring Washington's efforts to lean on other countries to cooperate with the Tribunal."). Cassel notes that the United States' interest in the functioning of the ICTR also stems from its extensive participation in funding and overseeing the tribunal. See *id.* (opining that U.N. Tribunal is largely court of United States' making).

209. See Crossette, *supra* note 82, at A10 ("The United States blocked Security Council efforts to intervene while the genocidal campaign was in progress, a policy for which President Clinton has since apologized to Africans."). Crossette further stated that "[t]he legal hurdles raised over the last three years to prevent Mr. Ntakirutimana's deportation have been an unexpected embarrassment to the Clinton Administration." *Id.*

210. See *id.* (noting United States' role in establishing ICTR); see also Cassel, *supra* note 72, at 5 (noting that United Nations Security Council set up ICTR to prosecute genocide at urging of United States).

211. For discussion of how the United States serves as an example in the international community, see *supra* note 202; Koppel & Elliott, *supra* note 72, at 1 (noting argument that Ntakirutimana should be extradited because this would set international precedent for other countries' cooperation with international tribunals).

212. See Kushen & Harris, *supra* note 75, at 517-18 (noting that extradition is motivated by current foreign affairs). Kushen and Harris note as follows:

[The United States] surrender framework also retains the strict limitations . . . on the ability of the fugitive to broaden the scope of an extradition proceeding. Thus, in a surrender proceeding a fugitive would be prevented, in effect, from obtaining a full trial on the merits prior to surrender, from litigating a Tribunal's motivation for prosecution, and from complaining of the conditions to which he will be subject following surrender [J]udicial consideration of these issues is prohibited, be-

cause the Agreements do not envision such consideration and because such consideration could become a significant irritant to the executive branch's conduct of foreign affairs.

Id.